No. 89-1083

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

J.I. HASS CO., INC.,

Petitioner,

– against –

GILBANE BUILDING COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REFERENCE TO OFFICIAL REPORT OF OPINION BELOW

The Opinion of the United States Court of Appeals for the Third Circuit from which Petitioner seeks review of this Court is officially reported as J.I. Hass Co. v. Gilbane Bldg. Co., 881 F.2d 89 (3rd Cir. 1989).

COUNTERSTATEMENT OF THE CASE

The facts relevant to this matter are substantially those set forth in the Opinion of the Court of Appeals. See Appendix E of the Petition.

Basically, Petitioner Hass entered into a Subcontract with Respondent Gilbane (sometimes referred to as "the Base Subcontract") wherein Hass agreed to perform painting work in specifically identified building locations being constructed at a Miller Brewery for $295,000. Hass also

entered into a change order to the Base Subcontract ("Change Order Number 1") agreeing to perform painting work at other specifically identified building locations at the Miller Brewery for an additional $753,000.

Both the Base Subcontract and Change Order Number 1 referenced a particular Room Finish Schedule for each building location and required Hass to paint the building systems designated for painting in the applicable Room Finish Schedules. The Base Subcontract Room Finish Schedules only required Hass to paint the architectural and structural portions of the applicable buildings while the Change Order Number 1 Room Finish Schedules, which were issued at a more advanced stage in the design of the Project, required Hass to paint the building

mechanical systems[1] as well as the architectural and structural portions of the applicable buildings.

The Subcontract contained a typical provision for additional compensation to Hass for the performance of extra work. It was under this provision that Change Order Number 1 was issued.

During performance of the work, a dispute arose between Gilbane and Hass as to whether Hass was obligated to paint certain building mechanical systems under Change Order Number 1. Hass subsequently performed some of the disputed work under protest and submitted a claim for additional compensation under the extra work provisions of the Subcontract in the sum of

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1 "Mechanical systems" is a collective reference to the building heating, ventilating and air conditioning systems, fire protection systems, plumbing systems, electrical systems and miscellaneous metallic surfaces.

$144,682.[2] Thereafter, Hass continued to perform the work under the Subcontract and Change Order Number 1, entered into many more change orders not in dispute, requisitioned for payments under the Subcontract and received payments under the Subcontract through to completion of the work as Hass viewed it.

After completion of the Project, Hass commenced this action in the district court. Hass contended, for the first time, in the First Count of the Complaint, that no contract existed because there was "no

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2 The claimed extra work concerned four items of building mechanical painting each in a separate building location. Three of them were part of Change Order Number 1 and the Room Finish Schedules applicable to each of them specifically required Hass to paint the disputed work. The fourth item was for painting of some ductwork in the Brewhouse which was a Base Subcontract Building and which was not shown on the applicable Room Finish Schedules referenced in the Base Subcontract. However, Hass concedes that it painted these ducts on its own and not pursuant to any request by Gilbane. See Appendix below, A2111.33 and A.2111.34.

meeting of the minds" as to the Hass obligation to paint Change Order Number 1 building mechanical systems. Based upon the total absence of a contract, Hass claimed quantum meruit total cost damages that exceeded its Subcontract balance and its claim for the disputed Change Order Number 1 building mechanical painting by more than $800,000 of alleged cost overruns which were not recoverable under the Subcontract. Alternatively, the Hass complaint sought a Subcontract balance in the sum of $431,130 and additional compensation in the sum of $144,682 for the Change Order Number 1 building mechanical painting performed by Hass under the extra work provisions of the Subcontract.

Notwithstanding Gilbane's motion for a directed verdict upon the First Count of the Complaint based upon the existence of a contract as a matter of law regardless of the scope of work dispute, the trial judge submitted the case to the the jury upon jury

instructions and written interrogatories which required the jury to decide whether or not a contract existed between Gilbane and Hass in the first instance. The jury instructions and interrogatories then required the jury to pass over all of the contract claims, upon concluding that no contract existed, and simply determine Hass' entitlement to quantum meruit total cost damages. The first question put to the jury read as follows:

> 1. Has plaintiff proven that there was no contract between plaintiff Hass and defendant Gilbane?
> Yes___No___

At the end of the first day of deliberations, the jury submitted the following communication to the trial court:

> Re Question no.1. We agree that the base contract existed and we agree that there was no meeting of the minds on change order no. 1. Confusion arises as to the wording of Question no. 1. Based on what we agree on, is the answer yes or no to Question no. 1?

Gilbane urged the trial judge to accept the foregoing communication as a jury determination that there was a contract between Hass and Gilbane and instruct the jury to proceed with a determination of the contract claims. Conversely, Hass argued that the Court below should respond to the question by instructing the jury to continue their deliberations with regard to question number 1 and make a determination as to whether, considering the work as a whole, there was or was not a contract.

Over Gilbane's objection, the Court below responded to the jury question as follows:

> I can only answer that at this time as follows: Considering the evidence and the Court's instructions as a whole and considering all of the work together, you must determine as a whole whether Hass has proven that their was no contract between the plaintiff Hass and the defendant Gilbane.

Thereafter, the jury returned with a verdict answering Question number 1 in the

affirmative, i.e., that there was no contract between Hass and Gilbane. In accordance with the Court's instructions the jury found that Hass was entitled to quantum meruit total cost damages. This resulted in an award to Hass of substantial claimed cost overruns without any determination of contractual or other legal entitlement.

Thereupon, Gilbane moved for judgment notwithstanding the verdict pursuant to Fed.R.Civ.P. 50(b) and for a new trial pursuant to Fed.R.Civ.P. 59(b), both of which were denied by the trial judge.

The Statement of the Case in the Hass Petition consists largely of self-serving contentions taken out of context. In many cases, Hass alleges facts that are not even supported by the Record.

In any event, most of the facts asserted in the Hass Petition deal with alleged communications predating the execution of the Base Subcontract and Change Order Number 1 which Hass contends evidence

an intent to exclude building mechanical painting from Change Order Number 1.[3] As such, they are irrelevant to the holdings set forth in the Opinion of the Court of Appeals which are based, in the first instance, upon the existence of a contract regardless of the scope of work dispute and, in the second instance, upon the unambiguous provisions of the contract regarding scope of work. They are also irrelevant in light of Hass' conceded knowledge that Change Order Number 1 included painting of the building mechanical systems before entering into the Change

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3 In fact, most of the Hass factual allegations consist of inadmissible parol evidence. In footnote 4 of the Opinion of the Court of Appeals, the Court specifically states that it is unnecessary to even address the admissibility issue because the underlying factual allegations are irrelevant to its ruling.

Order. A877, A961, A962, A993 and A994.[4] This latter fact was conveniently omitted from the Hass Statement of the Case.

SUMMARY OF ARGUMENT

There are no special and important reasons for granting a writ of certiorari in this case.

The Court of Appeals simply applied settled principles of appellate review to the trial court's denial of Respondent's motion for a directed verdict and for judgment n.o.v., as well as basic principles of New Jersey contract law, all of which are fully enunciated in the Opinion. In fact, the Petitioner does not even challenge the principles of law enunciated by the Court of Appeals. Rather, Petitioner's arguments are

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4 Reference is to Appendix below. Citations to the Appendix below for the other facts contained in this Counterstatement of the Case are substantially contained in the reproduction of the unreported Opinion of the Court of Appeals set forth as Appendix E in the Petition.

all based upon the application of the law to the particular circumstances of this case. Consequently, the issues raised in the Petition totally lack the special importance to the public, as distinguished from the parties, necessary for granting a writ of certiorari pursuant to the Rules and policy of this Court.

The Opinion of the Court of Appeals is simply a recognition that Gilbane and Hass entered into a contract and they are bound by its terms. As such it is legally and logically unassailable. It is grounded upon settled principles of New Jersey contract law that are cited in the Opinion.

The Hass Petition is nothing more than a restatement of confusing rationalizations that do not even contradict the existence of a contract between the parties when placed under scrutiny.

The Petitioners attempt to elevate the determinations of the Court of Appeals to a denial of Hass' Seventh Amendment right to

trial by jury is totally without merit. The Seventh Amendment only entitles a civil litigant to have disputed issues of fact tried by a jury. The determinations of the Court of Appeals were entirely grounded upon questions of law within the exclusive province of the trial judge pursuant to governing New Jersey law.

POINT I

THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI IN THIS CASE

A writ of certiorari will only be granted by this Court when there are special and important reasons to do so. Supreme Court Rule 17. The special and important reasons required for granting a writ of certiorari are with respect to the public in general as distinguished from the parties alone. Rice v. Sioux City Memorial Park Cemetary, Inc., 349 U.S. 70, 75 S.Ct. 614 99 L.Ed. 894 (1955). No such special and

important reasons exist in this case. Rather, the Petition merely seeks plenary review of an unfavorable decision of the Court of Appeals.

The Court of Appeals simply applied settled principles to appellate review to the District Court's denial of Respondent's motion for a directed verdict and judgment n.o.v., as well as basic principles of New Jersey contract law, all of which were enunciated in the Opinion. See, J.I. Hass Co. vs. Gilbane Bldg. Co., 881 F.2d 89, 92-94 (3rd Cir. 1989). Petitioner does not even challenge the statement of governing law by the Court of Appeals. Rather, Petitioner's arguments are all based upon the application of the law to the particular circumstances of this case and, thereby, lack the requisite public importance for granting a writ of certiorari.

Petitioner mischaracterizes its arguments for review in terms of a denial of its constitutional right to a jury trial in

an effort to create special and important reasons for granting certiorari. In fact, the jury determination in this-matter was limited to the non-existence of a contract between the parties which should have been decided by the trial judge as a matter of law. The same holds true with respect to the unambiguous terms of the contract as stated in the Opinion of the Court of Appeals which were also questions of law within the exclusive province of the trial judge pursuant to New Jersey law. See, Gray v. Joseph J. Brunetti Construction Co., 266 F.2d 809, 813, 814 (3rd Cir. 1959); Newark Publishers Ass'n v. Newark Typographical Union, 22 N.J. 419, 427, 126 A.2d 348, 353 (1956).

The Seventh Amendment only entitles a civil litigant to have disputed issues of fact tried by a jury. See, U.S. Const. Amend VII. The power of a judge to pass upon questions of law is just as much an essential part of the "jury trial"

guaranteed by the Seventh Amendment as the power of the jury to pass on questions of fact. Diederich v. American News Co., 128 F.2d 144 (10th Cir. 1942). It is well settled that the Seventh Amendment does not require a jury trial where there are no facts in dispute. Coleman v. C.I.R., 791 F.2d 68 (7th Cir. 1986).

The Opinion of the Court of Appeals in this case was grounded entirely upon questions of law and, therefore, the right to a jury trial guaranteed by the Seventh Amendment never comes into play. Coleman v. C.I.R., Id.

This Court has long since sanctioned the principles of appellate review applied by the Court of Appeals in this case and upheld the judicial application of directed verdict and judgment n.o.v. procedures against Seventh Amendment challenges. Baltimore & Carolina Line v. Redman, 295 U.S. 654, 55 S.Ct. 296, 79 L.Ed. 603 (1935); Galloway v. United States Products Co. v. Champlin, 283 U.S. 494,

51 S.Ct. 513, 75 L.Ed. 1188 (1931). See, also Slatton v. Martin K. Eby Constr. Co., Inc., 506 F.2d 505 (8th Cir. 1974), cert. denied, 421 U.S. 931, 95 S.Ct. 1657, 44 L.Ed 2d 88 (1975); King v. United Benefit Fire Ins. Co., 377 F.2d 728 (10th 1967) cert. denied, 389 U.S. 857, 88 S.Ct. 99, 19 L. Ed.2d 124 (1967); Cox v. City of Freeman, Mo., 321 F.2d 887 (8th Cir. 1963); Whitsell v. Alexander, 229 F.2d 47, cert. denied, 351 U.S . 932, 76 S.Ct. 783, 100 L.Ed. 1461 (1956).

This would be a terrible case under any circumstances for the United States Supreme Court to make important constitutional pronouncements. The Hass quantum meruit claim based upon the non-existence of a contract did not result from a good faith effort to fashion a remedy for the scope of work dispute upon which it is purportedly based. Rather, it was simply an effort to circumvent the express terms of a contract and attempt to recover damages

having nothing to do with scope of work without even proving that Gilbane committed any wrongdoing.

POINT II

THE OPINION IS LOGICALLY AND LEGALLY CORRECT AND THE PETITIONER'S ARGUMENTS TO THE CONTRARY ARE WITHOUT MERIT.

The balance of the Hass Petition is mainly a restatement of parol evidence and other collateral allegations that are irrelevant to the Opinion of the Court of Appeals. In fact, the Opinion is entirely grounded upon the following elementary determinations that are not even in dispute:

1. The parties entered into a valid Base Subcontract, the terms of which are not disputed. Even the jury found this to be true.

2. With full knowledge of the scope of work dispute regarding Change Order Number 1, Hass affirmed the Change Order and elected to pursue its remedies under the extra work provisions of the Subcontract. The logic of prohibiting a subsequent recission is inescapable.

3. Change Order Number 1 clearly and unambiguously required Hass to paint three of the four building mechanical systems in question. In this regard, the testimony of the Hass Project Executive as to the requirements of Change Order Number 1 was identical to the findings set forth in the Opinion. A838, 839, 850 and 859.

Placed in its most favorable light, the Hass Petition presents factual and legal arguments that may bear tangentially upon whether Change Order Number 1 required Hass to paint building mechanical systems and whether Hass was entitled to recover additional compensation totaling no more than $144,682 for the performance of extra work. However, the Hass Petition hardly addresses the primary holding that there was a contract between the parties regardless of the scope of work dispute. Nor does Hass explain how a dispute about a change order can negate the existence of the underlying contract that is not even in dispute and that was specifically found to exist by the jury.

It is academic that a court should never frustrate the intention of the parties to be bound by a contract unless necessary to bring about a fair and just result to a particular controversy. See Paley v. Barton Savings and Loan Ass'n, 82 N.J. Super 75,

83, 196 A.2d 682 (App. Div. 1964) . See, also 1 Corbin, Contracts §895, page 400 (1963). The foregoing principle was recently confirmed by this Court in Texas v. New Mexico, 482 U.S. 124, 107 S.Ct. 2279, 2284, 96 L.Ed. 2d 105, 114 (1987) which reasoned as follows:

> But good faith differences about the scope of contractual undertakings do not relieve either party from performance. A court should provide a remedy if the parties intended to make a contract and the contract's terms provide a sufficiently certain basis for determining both that a breach has in fact occurred and the nature of the remedy called for. Restatement (Second) of Contracts §33(2), and Comment b (1981). There is often a retroactive impact when courts resolve contract disputes about the scope of a promissor's undertaking; parties must perform today or pay damages for what a court decides they promised to do yesterday and did not.

In the instant case, there was absolutely no reason to even consider the non-existence of a contract. Assuming a legitimate dispute as to Hass' obligation to paint the Change Order Number 1 building mechanical systems, the extra work

provisions of the Subcontract afforded the appropriate vehicle for complete relief. In fact, that is the customary manner for resolving scope of work disputes in the construction industry and the manner chosen by the parties themselves before the posturing of this litigation.

Even viewing the scope of work dispute in the context advanced by Hass, the issue of "a meeting of the minds" applies only to the Hass obligation to paint building mechanical systems under Change Order Number 1. Therefore, if quasi-contractual relief were necessitated to achieve "a fair and just result" such relief should have been limited to the building mechanical work actually performed by Hass rather than the entire contractual relationship. This would have afforded Hass complete relief with respect to the scope of work dispute without otherwise depriving Gilbane of its rights under the Subcontract. This is exactly what the Court of Appeals instructed the trial

court to do in the event that the jury were to find that the Hass painting of ductwork in the Brewhouse was not intended to be dealt with pursuant to the extra work provisions of the Subcontract.

The fact that the parties continued to perform in every respect under the Subcontract for more than a year after the scope of work dispute was unquestionably known to both of them, and they even treated the dispute as coming under the extra work provisions of the Subcontract, makes the denial of contract existence even more absurd. Hass does not even deny its own affirmance of the Subcontract which constitutes an election of remedies and precludes the contrary position that no contract existed after performance was rendered. See, Merchants Indemnity Corp. v. Eggleston, 37 N.J. 114, 130-131, 179 A.2d 505, 513 (1962). See also, Restatement Second of Contracts, §380 and §380 Comments "a" and "b" (1979); Restatement of Restitution, §64 and §68 (1937).

The Opinion of the Court of Appeals cites Merchants Indemnity Corp. v. Eggleston, supra, as expressing the governing law of New Jersey with respect to election of remedies. The Hass Petition does not even dispute the applicable principles of law expressed by the New Jersey Supreme Court in Merchants Indemnity. Rather, the Hass efforts to distinguish Merchants Indemnity are based solely upon the fact that it concerned an insurance contract and not a construction contract which has nothing to do with the applicable legal principles expressed.

The Hass Petition references a Change Order Number 1 Room Finish Schedule as causing confusion because it was issued after Hass estimated the Change Order Number 1 work. However, Hass omits to disclose that all the other Change Order Number 1 Room Finish Schedules, which required the painting of building mechanical systems, were issued prior to estimating Change Order

Number 1. A4111, A4112, A4146 and A4114. Additionally, the Change Order Number 1 Room Finish Schedule, that Hass complains about, was issued to Hass with a Request for Change Quotation long before Change Order Number 1 was entered into. A2641-A2650, A3441 and A3451.

The Hass propensity for confusing rationalization is typified by its reference to trial Exhibit P76 as consisting of two charts prepared by Gilbane and purportedly depicting the scope of Gilbane's painting obligation to Miller and Hass' painting obligation to Gilbane. However, there was no testimony in the Court below as to who prepared these charts, the circumstances of their preparation and what they purport to show.

All of the comments in the Hass Petition regarding the scope of work dispute suffer the same infirmity as the contentions specifically addressed above. When placed under scrutiny they have nothing to do with

the scope of Hass' contractual undertaking. Rather, their ultimate purpose is to confuse the fact that Change Order Number 1, on its face, clearly required Hass to paint building mechanical systems and that those requirements were fully known to Hass when Change Order Number 1 was entered into.

Additionally, all of the Hass factual contentions consist of parol evidence seeking to contradict the terms of an integrated agreement and should have been excluded from evidence by the Court below.

It is well settled in New Jersey law, properly recognized by the Court of Appeals in its Opinion, that the objective intent of parties manifested by their written agreement governs the interpretation of a contract. Banco Urban Renewal Corp. v. Housing Authority of City of Atlantic City, 674 F.2d 1001, 1008 (3rd Cir. 1982); Kearny PBA Local 21 v. Town of Kearny, 81 N.J. 208, 221, 405 A.2d 393, 400 (1979). Friedman v. Tappan Development Corp., 22 N.J. 523, 531,

126 A.2d 646, 650 (1956) ; Leitner v. Braen, 51 N.J. Super. 31, 38, 143 A.2d 256, 260 (App. Div. 1958). Hass does not even disagree with this principle.

However, Hass does not identify anything in the Subcontract documents inconsistent with the holding in the Opinion of the Court of Appeals that Change Order Number 1 included the painting of building mechanical systems or consistent with Hass' position to the contrary. Rather, Hass continues to rely entirely upon extraneous factors in support of its position. Also, aside from a few confusing and somewhat incomprehensible rationalizations, Hass virtually ignores the Room Finish Schedules which the Project Specifications reference as defining the scope of Hass' work (A3336 and A3337) and the testimony of its own Project Executive to that effect (A838-A839, A850 and A859). The Hass Petition similarly fails to reconcile its admitted knowledge when Hass entered into Change Order Number 1 that it

required the painting of building mechanical systems (A877, A961-A962, A993 and A994).

Contrary to the confusing characterizations in the Hass Petition, the scope of painting work is not difficult to discern from the Subcontract documents. The Base Subcontract and Change Order Number 1 each identify the buildings to be painted and refer to Rider "A" for the particular painting requirements for each building. A4155, A3466. In each case, Rider "A" references a Room Finish Schedule for each building and Section 9F of the Project Specifications directs Hass to paint the building elements designated for painting on the Room Finish Schedules. See specifically A3336, Section 1.1.3. This is exactly how it was described by the Hass Project Executive (A838-839, A850 and A859) and in the Opinion of the Court of Appeals.

The fact that Hass was not obligated to paint building mechanical systems under the Base Subcontract but was obligated to

paint building mechanical systems under Change Order Number 1, and that Hass knew it, is independently verified by the exclusions listed in the Pre-Award Meeting Minutes applicable to each of them. See Rider "B", Section 20 of A4093, A3453 and A2981-2992.

Finally, the fact that the Base Subcontract and Change Order Number 1 were physically executed on the same day is meaningless. The essential underpinnings of the Opinion of the Court of Appeals remain the same, i.e., a valid Base Subcontract was entered into and Hass affirmed Change Order Number 1 with full knowledge of the scope of work dispute and elected to pursue its remedies under the extra work provisions of the Subcontract.

CONCLUSION

For the reasons set forth herein and in the Opinion of the Court of Appeals from which review is being sought, Respondent

Gilbane Building Company[5] respectfully requests that the Petition for a Writ of Certiorari of J.I. Hass Co., Inc. be denied.

DATED: River Edge, New Jersey
January 22, 1990

Respectfully submitted,

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A Professional Corporation
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5 Pursuant to Supreme Court Rule 28.1. there are no parent companies or subsidiary companies (except wholly owned subsidiaries) of Respondent Gilbane Building Company and the only affiliate of said corporation is B.T. Equipment Company, Inc.